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No. 94-1692

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHNSON & HIGGINS,

Petitioner,

vs.

BURT N. SEMPIER,

Respondent.

PETITIONER'S REPLY BRIEF

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June 15, 1995

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I

THE COURT OF APPEALS' HOLDING IS CORRECTLY STATED IN THE PETITION AND REFLECTS A CONFLICT AMONG THE COURTS OF APPEALS AND WITH THIS COURT'S DECISION IN HICKS

Respondent does not challenge J&H's analysis of the division among the courts of appeals regarding how *St. Mary's Honor Center* v. *Hicks*, ___ U.S. ___, 113 S. Ct.

2742 (1993), is to be interpreted in the summary judgment context (Pet. 14-16). Rather, he attempts to obfuscate with regard to what the court of appeals explicitly held here. (*Compare id.*, 8-12 *with* Br. Opp. 12-17.) But the question J&H asks the Court to review is directly presented by the court of appeals' own "recap" of its decision:

> [O]nce Sempier had made out a prima facie case of age discrimination, a presumption arose that J & H had discriminated against him. *Burdine*, 450 U.S. at 254. J & H dispelled that presumption by coming forward with a nondiscriminatory reason for Sempier's discharge, leaving nothing but the permissible inference of discrimination created by the prima facie case. *Hicks*, ___ U.S. at ___; 113 S. Ct. at 2748-49. Sempier's attack on J&H's stated reasons for his discharge leaves us with the paradigmatic case in which each party has produced testimony and evidence that conflicts on the ultimate issue -- whether Sempier was discharged for poor performance or because of his age. The resulting conflict must be resolved by a jury and cannot be resolved on summary judgment. (Pet. 18a-19a (emphasis added).)

The court of appeals could not have been clearer that the prima facie case which it found Mr. Sempier had made out (*id.*, 8-10) -- a finding which, tellingly, Mr. Sempier spends no time defending -- gave rise to a "permissible inference of discrimination" that a jury would be free to draw, without regard to what *all* the evidence bearing upon discriminatory intent might justify, if it found Mr. Sempier's "attack on J&H's stated business reasons" plausible. That view of the law is consistent with the holdings of at least the Fourth, Sixth, Eighth and Ninth Circuits, but in conflict with the First and Fifth Circuits and, we respectfully submit, *Hicks* as

well (*id.*, 14-16). A resolution of that conflict is of first importance to federal discrimination law (*id.*, 17-21).

II

RESPONDENT'S ASSERTIONS CONCERNING THE RECORD ARE IRRELEVANT AND INACCURATE, BUT INSTRUCTIVE

Because the Petition asks this Court to consider whether or not the court of appeals applied the proper legal standard in reviewing the summary-judgment record before it, it is not necessary here to correct any of Mr. Sempier's assertions as to what the admissible evidence in that record is competent to establish. (See Pet. 10 n.4, 11 n.5, 19 n.6.) However, J&H believes that the following three comments on Mr. Sempier's Statement of the Case will serve to illustrate the thin gruel a discrimination plaintiff is encouraged to rely upon by the formulaic use in the summary-judgment context of a prima facie case finding under the *McDonnell Douglas* framework, after that framework is supposed to have "drop[ped] from the case." *Burdine*, 450 U.S., at 255, and "is no longer relevant," *Hicks*, 113 S. Ct., at 2749.

A.

A little over a page is devoted to the alleged "Coercive Retirement Program" which J&H's then CEO, Mr. Hatcher, initiated in May 1989 (Br. Opp. at 3-4). Everything said represents counsel's "interpretation" of six J&H documents (JA636-642). The last document in the sequence is a copy of the minutes of the Personnel and Compensation ("P&C") Committee on December 5, 1989 (JA 642), which stated in pertinent part:

> Dick Nielsen [an Executive Vice President and Director] reviewed with the Committee the status of what has been the corporate plan for early retirements. From the original 85 candidates that were

> put on the list in response to Mr. Hatcher's memorandum last summer, 7 additional people have been added. Of the 92 people in total, the following is a breakdown of their current status: 13 retired or will be retiring; 4 resigned; 4 were terminated; 50 were removed from the list for various reasons; 21 still on the list (13 for poor performance and 8 for being redundant). The Legal Department will be consulted with regarding the next step with this project.

As a member of the P&C Committee -- indeed, the Personnel Department reported to him at the time (Pet. 4-6) -- Mr. Sempier was in the middle of these events. On his deposition he testified that he believed that the original list of people produced in response to Mr. Hatcher's memorandum included some who had been put on because of their age. Asked why he thought so, Mr. Sempier answered, "I was led to understand that some people misunderstood some of what Hatcher was asking for, and advanced names simply because they were at or near retirement" (JA 454, lines 4-7). Asked the same question about the 42 who remained after the 50 were removed from the list for various reasons, Mr. Sempier said, "I can't say because I don't know who the 42 were. I don't recall who the 42 were." (*Id.* lines 24-25.) Similarly, as to the 13 who retired, Mr. Sempier did not know how they came to retire (JA 456, lines 20-21), nor did he have any information about the four who resigned or the four who were terminated (JA 457, lines 10-13). He could not identify a single individual, other than himself, whom he believed was a victim of age discrimination, and he testified that he had no reason to believe J&H had done anything wrong under the Program. (JA 458-60.) The only basis for Mr. Sempier's alleged belief that *he* was mistreated because of his age was that, allegedly, no "real reasons" were "offered up" to him before his resignation was accepted on June 11, 1991 (JA 425-33).

B.

The assertion that no "real reasons" for the Board's unanimous acceptance of Mr. Sempier's resignation were "offered up" is continued in this Court:

> . . . respondent was never informed of any cause or reason for the termination of his directorship and employment with petitioner, particularly any reason involving his performance . . . (Br. Opp. at 11.)

(See also *id.*, 2 and Pet. 4-6, 19 n.6.) However, the record shows, among other things, that two months before his resignation was accepted, J&H's counsel wrote to Mr. Sempier's counsel as follows (JA 277):

> What this matter is about is that, for some time now, Mr. Sempier has not had enough to do, even nominally, to justify his continuing as a Director of J&H. In the five years since he was elected a Director, Mr. Sempier has failed effectively to perform any of the major responsibilities that were assigned to him; one after another his finance, administration, and management-information functions have had to be taken away and assigned to others, and he has become the lowest paid of J&H's 37 Directors. The longer he is left in place the greater the risk of injury to the credibility of the Directors as leaders of the firm, to the morale of hard-working subordinates who are aware of the facts, and in J&H's judgment, to Mr. Sempier himself. Mr. Olsen and the other senior managers of J&H believe therefore that, if requested, considerably more than two-thirds of the Directors would authorize Mr. Olsen to accept the letter of resignation Mr. Sempier signed when he first became a Director.

C.

The bulk of Mr. Sempier's Statement of the Case is devoted to alleged events subsequent to April 19, 1990, the day Mr. Hatcher told him in no uncertain terms that he would have to leave J&H (Br. Opp. at 5-10). The inference that the reader is obviously supposed to draw is that because from April 1990 until June 1991 J&H was trying to get him to *retire*, its motives must have been age-based. However, Mr. Hatcher testified, without contradiction, that "A Director who is 55 years of age or older at the time he leaves J&H, regardless of reason, is treated as a retiree under J&H's Plans" (JA 369). Mr. Sempier was 58 years old in April 1990 (JA 492).

CONCLUSION

The Court should grant certiorari and set this case for plenary consideration.

Respectfully submitted,

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